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IN THE

Supreme Court of the United States

October Term, 1970

No. ~~1704~~ 70-166

MARTIN GOLDMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1970

No. .....

MARTIN GOLDMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on March 17, 1971.

Opinions Below

The opinions of the United States District Court for the Southern District of New York (unreported) and of the United States Court of Appeals for the Second Circuit (not yet officially reported) appear in Appendix B hereto, *infra*, pp. 17-23.

Jurisdiction

The judgment of the Court of Appeals was entered on March 17, 1971, affirming petitioner's conviction dated September 14, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether an indictment is valid if voted by a grand jury which heard only the hearsay reading of testimony of the Government's principal witness given before a different grand jury which had not voted an indictment.

2. Whether a conviction of conspiracy to violate 18 U.S.C. § 1952 is fatally defective as inconsistent with the jury's contemporaneous acquittal of the same defendant of substantive offenses, requiring proof of an identical intent, and which are the overt acts supporting the conspiracy conviction.

3. Whether this Court's recent decision in *Rewis* v. *United States* precludes defendant's conviction for conspiracy to violate 18 U.S.C. § 1952 where the aim of the alleged conspiracy was a single act of extortion.

Statutory Provisions Involved

Sections 1952, 371 and 2 of Title 18, United States Code, are set out verbatim in Appendix A, *infra,* pp. 15-16.

Statement

Relevant Evidence

In April 1968, Henry Williams III (hereinafter "Williams"), the Government's principal witness, and one Seymour Flax ("Flax"), approached petitioner to join them in the purchase of large quantities of platinum at below prevailing market price (A174-77).* The proposed venture required $100,000 (A20). Petitioner, then an officer of several corporations, both public and private, agreed, at Williams' and Flax's behest, to arrange for a loan of $100,000 to be made to them, through one of petitioner's corporations, with each of the three of them agreeing to be liable for one-third of the loan (A23-24).

Without detailing the events that followed (which the Court below described as "suitable for the cinema or for television"), it is sufficient here to state that Williams, Flax, petitioner and an attorney flew to the West Coast where the purchase was to be made (A24); that Williams, who was to exchange the $100,000 for the platinum, tried, but failed, to obtain a bodyguard (A31-32); that petitioner then telephoned co-defendant Michael Catalano who flew to the West Coast to guard Williams (A204); and that, despite these precautions, the $100,000 was stolen from Williams (A46).

After an unsuccessful attempt to recover the money, Williams and Flax returned to New York (A47-50). Williams testified that at the California airport, prior to de-

* Citations containing the prefix "A" refer to respective pages of the appendix filed in the United States Court of Appeals for the Second Circuit.

parture on May 3, 1968, Catalano reminded Williams of the latter's liability for one-third of the lost $100,000 (A51).

Then followed Williams' testimony of the alleged violations committed in the Southern District of New York. According to Williams, several days after he returned from California to his home in New Jersey, he received a telephone call from petitioner during which a meeting was arranged to be held in New York, between Williams, the petitioner and Catalano (A53). Williams testified that this meeting was held in New York in early May (A232), and that, during it, Catalano punched him several times, *over petitioner's protests* (A56-57).

Finally, according to Williams, petitioner called again in mid-June, and arranged for another meeting of the three joint venturers and Catalano to be held in New Jersey (A63-64, A66). Williams testified that, at this second meeting, Catalano—not petitioner—threatened bodily harm if Williams did not pay his one-third of the $100,000 loss (A66).

Grand Jury Presentation in the Eastern District of New York

In March 1969, Williams testified about the foregoing events before a grand jury in the Eastern District of New York, which never voted an indictment.

Grand Jury Presentation in the Southern District of New York

On December 2, 1969, the Government unexplainedly represented the same matter to a grand jury in the South-

ern District of New York. But, instead of having Williams appear and testify in order to permit the Southern District grand jury to make its own appraisal of Williams' testimony, the Government merely had the grand jury reporter from the Eastern District identify the transcript of the testimony Williams had given in that other grand jury. The prosecutor then read this transcript to the grand jury. Based solely on this hearsay evidence, the grand jury voted the indictment against petitioner.

The Government offered no reason for its failure to obtain an indictment from the Eastern District grand jury. With regard to its failure to call Williams as a witness in the Southern District grand jury, the Government merely represented that it had been advised that Williams was "unavailable" on the day in question (December 2, 1969), and that an agent had "attempted to reach" Williams at his residence "on several occasions prior to 2 December 1969 but was unable to reach him." The Government did not, however, attempt to reconcile these representations with the undisputed facts that the Government had no problem in producing Williams as a witness in November 1969 (at the Eastern District grand jury), in February 1970 (to testify in California), and in June 1970 (when he testified at the instant trial).

The Indictment

The indictment voted by the Southern District grand jury charged petitioner and co-defendant Catalano with the following four counts: (1) with intent to extort, causing Williams to travel between New Jersey and New York on or about May 10, 1968, in violation of 18 U.S.C. §§ 1952 and 2; (2) with intent to extort, traveling from New York to

New Jersey on or about June 20, 1968 in violation of 18 U.S.C. §§ 1952 and 2; (3) conspiring to collect an extention of credit by extortionate means, in violation of 18 U.S.C. § 894; and (4) conspiring to intend to commit an extortion, using the telephone in interstate commerce, in violation of 18 U.S.C. § 371. The fourth count alleged five overt acts, four of which were acts of arranging and holding of the meetings alleged in counts one and two; the remaining overt act alleged a meeting in California, outside of the Southern District of New York, and before Williams had lost the $100,000.

The Verdict

The trial court dismissed count three at the end of the Government's case. The jury acquitted petitioner and Catalano on counts one and two, and found them guilty on count four, the conspiracy count. Petitioner was sentenced to a one-year term of imprisonment.

Reasons for Granting the Writ

As hereinafter shown, several bases for granting certiorari are found in the various issues raised by this petition: conflict among and within the circuits and district courts; important questions not yet finally determined by this Court; and conflict with an applicable decision of this Court.

1. The decision below, sustaining an indictment based solely on hearsay evidence before the grand jury, raises an issue on which many conflicting decisions have been written by circuit and district courts; these conflicts suggest the

need for this Court to settle this important question of constitutional and criminal law.

Fifteen years ago, this Court in *United States* v. *Costello,* 350 U.S. 359 (1956), held that an indictment was valid, although the grand jury heard only hearsay testimony by agents, summarizing complex financial records and other evidence. Since that decision, and in light of the trend of this Court's opinions on criminal law, substantial question has been raised as to the scope of the *Costello* ruling and even its continued vitality.

Several decisions have criticized the use of only hearsay evidence to obtain an indictment. Thus, in *United States* v. *Umans,* 368 F.2d 725 (2d Cir. 1966), *cert. granted,* 386 U.S. 940, *cert. dismissed as improvidently granted,* 389 U.S. 80 (1967), the Second Circuit, while sustaining the indictment, expressly referred to the "excessive use of hearsay" as "destroy[ing] the historical function of grand juries * * * and * * * the protection * * * that grand juries are supposed to afford * * *." *Id.* at 730. The Court therefore prospectively directed that "[h]earsay evidence should only be used when direct testimony is unavailable or when it is demonstrably inconvenient to summon witnesses able to testify to facts from personal knowledge." *Ibid.* Shortly after *Umans,* Judge Weinstein, in *United States* v. *Arcuri,* 282 F. Supp. 347 (E.D.N.Y. 1968), held that all future indictments would be dismissed "without a showing of prejudice to the defendant if it is clear that hearsay alone was deliberately relied upon when better evidence was readily available for presentation to the grand jury." *Id.* at 351. The Second Circuit affirmed, 405 F.2d 691 (1968), specifically noting, and quoting with implicit approval, Judge Weinstein's prospec-

tive ruling. Thereafter both the District Court for the Southern District of New York and the District Court for the District of Rhode Island, adopted the same prohibition in those courts. *United States* v. *Filippatos*, 307 F. Supp. 564 (S.D.N.Y. 1969); *United States* v. *Gramolini*, 301 F. Supp. 39 (D.R.I. 1969). The *Filippatos* decision made the prohibition applicable to all indictments filed after December 9, 1968 in the Southern District of New York—a date long before the instant indictment was returned.

Other holdings in the same and different circuits, however, conflict with these decisions. *E.g., United States* v. *Bracio*, 422 F.2d 543 (7th Cir.), *cert. denied*, 398 U.S. 912 (1970); *Jack* v. *United States*, 409 F.2d 522 (9th Cir. 1969). This conflict is compounded by a conflict within the Second Circuit itself. Thus, in *United States* v. *Leibowitz*, 420 F.2d 39 (2d Cir. 1969), the court ruled that an indictment based solely on hearsay is valid unless "dismissal is required to protect the integrity of the judicial process." *Id.* at 42. In *United States* v. *Russo*, 413 F.2d 432 (2d Cir. 1969), the court held that "a good reason not to call a particular witness"—*i.e.*, a threat on his life—sustains use of hearsay testimony before a grand jury (*id.* at 435). And, one month before the *Filippatos* proscription in the Southern District of New York against indictments based solely on hearsay, another judge in that court had held that *Costello* authorized such indictments. *United States* v. *DiLorenzo*, 49 F.R.D. 86 (S.D.N.Y. 1969).

In the instant case, no reason was offered for initially presenting Williams' testimony to an Eastern District of New York grand jury, for not obtaining an indictment from that grand jury, and for then suddenly seeking an indictment from a grand jury in another district. Further,

no credible explanation was offered for the Government's failure to produce Williams to testify before the Southern District grand jury; the feeble and undetailed excuse of Williams' "unavailability" falls in the light of the Government's ability to produce Williams on other occasions shortly before and shortly thereafter. Indeed, the trial record suggests a reason—extremely prejudicial to petitioner—for the Government's unusual switch from one grand jury to another and subsequent refusal to produce Williams before that second grand jury. During Williams' direct examination at trial, he, at one point, confessed an inability to recall and requested and was granted permission to *read* the transcript of his grand jury testimony while answering questions at trial (A67-72). He also required recourse to his grand jury transcript during cross-examination (A228, A238). Such lapse of memory, if it had been permitted to have occurred in the Southern District grand jury, might have resulted in a no-true bill or, at the very least, substantial testimonial inconsistencies which could have been used to impeach Williams at trial.

In view of these facts, and the clear conflict among and within the circuits, this Court should resolve this issue, involving a procedure basic to our criminal law.

2. The affirmance below of petitioner's conviction, on the conspiracy count, despite its irreconcilable inconsistency with the jury's not guilty verdict on the substantive counts, raises an important question, involving a conflict among the circuits. In addition, substantial uncertainty exists on this subject of inconsistent verdicts in criminal cases which should be settled by this Court.

Approximately forty years ago, in *Dunn* v. *United States,* 284 U. S. 390 (1932), this Court held that a conviction may not be overturned because of an inconsistent verdict on another count in the same trial. That holding was logically required, according to the *Dunn* opinion, by the rule that *res judicata* could not be pleaded as a defense if the two counts had been separately tried.

Since then, however, that decision has been eroded and, indeed, disregarded, in line with the trend towards a more rational and logical criminal jurisprudence. In *Sealfon* v. *United States,* 332 U. S. 575 (1948), this Court *sub silencio* overruled the rule on which *Dunn* was based, by holding that a prosecution for a substantive offense was precluded by the defendant's acquittal on a previously-tried conspiracy indictment which amounted to "a determination favorable to [defendant] of the facts essential to conviction of the substantive offense." *Id.* at 578-79. Even where both the conspiracy count and the substantive count are tried together, and results in an acquittal on one count and a hung jury on the other, the Government is barred from retrying the defendant on the count on which the jury disagreed if the facts essential to a conviction on that count had been decided adversely to the Government as part of the acquittal on the other count. *Cosgrove* v. *United States,* 224 F. 2d 146 (9th Cir. 1954).

While the Second Circuit has repeatedly held, as here, that it will not disturb a *jury* verdict because of inconsistency, it has reversed verdicts *tried to the court* because of inconsistency. *United States* v. *Maybury,* 274 F. 2d 899 (2d Cir. 1960). Indeed, that court has suggested a non-jury conviction of one defendant is fatally defective if it is

inconsistent with the acquittal of another defendant. *United States* v. *Wilson*, 342 F. 2d 43 (2d Cir. 1965); *United States* v. *Sells*, 325 F. 2d 161 (2d Cir. 1963).

The Fifth Circuit's decision in *Herman* v. *United States*, 289 F. 2d 362, *cert. denied*, 368 U. S. 897 (1961), conflicts with the Second Circuit rule that inconsistency in a jury verdict is to be disregarded. In *Herman*, the Sixth Circuit reversed a conviction on a conspiracy count because it was inconsistent with the simultaneous acquittal on the substantive offense which was the only overt act supporting the conspiracy count. *Id.* at 368. *Accord*: *Hughes* v. *United States*, 95 F. 2d 538 (5th Cir. 1938).

The Second Circuit's disregarding of inconsistent jury verdicts is based solely on a legal fiction which cannot withstand analysis and, more important, makes a mockery of our criminal justice system. A defendant is no less prejudiced by an inconsistent verdict rendered by a jury than one announced by a judge; in fact, a judge's training and experience might suggest that his verdict be less scrutinized than that of an untrained jury which is more susceptible to emotional and time pressures. Likewise, in a jury trial, no meaningful reason exists for sustaining a conviction which is inconsistent with a simultaneous acquittal while holding that a jury disagreement on one count which is inconsistent with a simultaneous acquittal on another count is converted by *res judicata* into an acquittal. These serious questions, together with the conflicting view held by the Sixth Circuit warrant this Court's review.

The instant case affords a clear setting for this Court's determination of this issue of inconsistent verdicts by a

jury. Petitioner was acquitted on counts 1 and 2 which charged travelling or causing another to travel in interstate commerce *with intent* to extort, in violation of 18 U.S.C. §§ 1952 and 2. Petitioner was convicted on count 4 which charged him with conspiracy to violate § 1952, *i.e., conspiring to intend* to travel interstate to extort.

Since the proof of intent required for the substantive and for the conspiracy offenses is identical [*Ingram* v. *United States*, 360 U.S. 672 (1952); *United States* v. *Chase*, 372 F.2d 453 (4th Cir.), *cert. denied*, 387 U.S. 907 (1967)], a finding of inconsistency in the jury's verdict depends on whether the acts alleged and proved in support of the substantive offenses were inextricably intertwined with the overt acts alleged in support of the conspiracy count. Here, they clearly were. The four relevant overt acts alleged in support of the conspiracy count,* merely allege the making of the telephone calls which induced the travelling alleged in counts 1 and 2, and the meetings for which the travelling was done. On the allegations and evidence in this case, a jury's rejection of the substantive charges precluded a finding of the existence of any one of the relevant overt

* No identity need be shown as to overt act 1 in count 4 since it could not support a conviction on the conspiracy count. Overt act 1 alleged a meeting in the Southern District of California, outside of the Southern District of New York. Therefore, in view of the absence of evidence as to the situs of the alleged agreement, it cannot satisfy the requirement of an overt act within the district. *United States* v. *Williams*, 424 F.2d 344 (5th Cir. 1970). Moreover, this alleged overt act occurred on May 1, 1968—*before* Williams had lost the $100,000; since the illegal intent was directed at Williams' repayment of one-third of that lost money, this intent, essential to a finding of conspiracy, could not have been formed until *after* the money was lost. *Cf. United States* v. *Boticello*, 422 F.2d 832, 834 (2d Cir. 1970). Indeed, the trial court expressly instructed the jury that the "charges in this case which you are going to have to decide * * * occurred after that time". (Court's charge to the jury, Trial Transcript, p. 642.)

acts.* This inconsistency of verdicts should not be permitted to remain.

3. The decision below conflicts with this Court's recent opinion in *Rewis* v. *United States*, 39 U.S.L.W. 4363 (April 5, 1971)** which held that a single or sporadic use of interstate travel for illegal activity, as alleged here, could not support a conviction for violation of § 1952. Rather, this Court explained, § 1952 "was aimed primarily at organized crime, and, more specifically, at persons who reside in one state while operating or managing illegal activities located in another." *Id.* at 4364. Legislative history of § 1952, relied on by this Court in *Rewis*, establishes that this statute was not designed to curtail "sporadic, casual involvement" in extortion, "but rather a continuous course of conduct sufficient for it to be termed a business enterprise." *Id.* at 4364 n. 6. The instant indictment charged only a single intended extortion; the Government's evidence at best only tended to establish a single extortion. Hence, the intervening decision in *Rewis* warrants this Court's review and reversal of the judgment below.

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* Significantly, neither the decision below nor the Government's brief below even attempted to verbalize a rational reconciliation of the jury's verdict.

** This issue is raised for the first time here. *Rewis* was not decided until after the decision below in this case. In such circumstances, this Court may review a question not presented below. *Cf. Lawn* v. *United States*, 355 U.S. 339, 362 n. 16 (1957).

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

GERALD WALPIN
Attorney for Petitioner

JUDITH S. FEIGIN
Of Counsel

May 12, 1971

APPENDICES

Appendix A

Statutory Provisions

1. 18 U.S.C. § 2

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

2. 18 U.S.C. § 371

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

3. 18 U.S.C. § 1952

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

Appendix B

Opinions Below

Opinion of the United States Court of Appeals for the Second Circuit, March 17, 1971

Nos. 35463, 35513

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

MICHAEL VINCENT CATALANO and MARTIN GOLDMAN,

Appellants.

Before:

WATERMAN, MOORE and FEINBERG,
Circuit Judges.

PER CURIAM:

The background of this case presents a most bizarre tale of international commercial intrigue. However, for the purposes of our decision, it is not necessary to narrate the full script, which is suitable for the cinema or for television. We therefore confine ourselves to the essential details of the case.

Appendix B

The evidence, viewed in the light most favorable to the Government, shows that the appellant Goldman entered into a joint venture with one Williams and one Flax to obtain a large quantity of platinum below the market price and to sell it for a large profit. To finance the venture Goldman obtained a loan of $100,000 through a corporation of which he was vice-president, and each of the venturers agreed to be liable for $33,000. After a series of frustrating negotiations, a purchase was arranged, and Williams was sent to San Diego to take delivery. Goldman subsequently arrived in California with Catalano. As the seller insisted on a cash transaction, Catalano was to be Williams' bodyguard. Williams made the final contact with the purported seller, but was tricked out of the $100,000 in cash when that individual suddenly vanished with the money.

Before leaving San Diego, Catalano told Williams that Williams would still be liable to Goldman for $33,000 of the stolen funds, for Goldman was responsible for the $100,000 loan. After the parties returned to New York, Goldman allegedly arranged by phone for Williams to go from New Jersey to New York to discuss the loss of the money. At the alleged meeting Catalano, in Goldman's presence, assaulted Williams and delivered him a deadline within which the $33,000 would have to be paid. Later Goldman, by phone from New York, arranged another meeting with Williams in New Jersey at which Catalano in Goldman's presence again allegedly threatened Williams.

Appellants were tried on a four-count indictment, of which count 3 was dismissed at trial. Count 1 charged that

with reference to the first meeting in New York City, the appellants caused the illegal travel of Williams with intent to extort money from him in violation of 18 U.S.C. §§1952 and 2. Count 2 charged interstate travel with intent to extort with regard to the meeting in New Jersey. Count 4 alleged a conspiracy to commit the substantive acts in counts 1 and 2 and alleged as overt acts the San Diego meeting, Goldman's two phone calls, and the two meetings alleged in counts 1 and 2. After a jury trial, both appellants were found to be not guilty on counts 1 and 2, and to be guilty on count 4.

Appellants contend that, because of their acquittals on counts 1 and 2, there was insufficient evidence to support their convictions on count 4. Essentially this argument relies on the apparent inconsistency in the jury verdicts. However, under *United States* v. *Carbone*, 378 F.2d 420 (2 Cir.), *cert. denied*, 389 U.S. 914 (1967), reversal is not necessarily required by inconsistent jury verdicts. Furthermore, we do not find any necessary inconsistency in these jury verdicts. Only one overt act was necessary to support the conspiracy conviction, and, without passing on whether the San Diego meeting was actually connected with the alleged conspiracy, it is evident that the jury could have reasonable doubts on some of the overt acts connected with the substantive counts and still have been convinced as to at least one overt act alleged in the conspiracy count.

Appellants' second contention is that the indictment should have been dismissed because it was founded on the hearsay reading of Williams's former testimony before another grand jury and because the Government's explana-

tion of why Williams failed to testify in person before the indicting grand jury did not adequately justify the use of a transcript in lieu of a personal appearance. However, appellants have not surmounted *United States* v. *Leibowitz,* 420 F.2d 39 (2 Cir. 1969), which acts as a limitation on the cases so carefully expounded in appellants' briefs. Here the grand jury knew that it was getting hearsay testimony and appellants have not shown "that there is a high probability that with eye-witness rather than hearsay testimony the grand jury would not have indicted." *Id.* at 42. See also *United States* v. *Rosenstein,* 434 F.2d 640, 641 (2 Cir. 1970).

Appellant Goldman also asserts that the indictment was duplicitous in that in essence counts 1 and 2 charge subconspiracies already covered in count 4. While we agree that the proof of intent under 18 U.S.C. §1952, see *United States* v. *Botticello,* 422 F.2d 832 (2 Cir. 1970), might require proof of a conspiracy on counts 1 and 2 in this case, we cannot say that counts 1 and 2 are conspiracy counts. Counts 1 and 2 charge substantive offenses which extend beyond an agreement between the appellants. Thus, even though the evidence may overlap on the substantive and conspiracy counts, the counts allege separate violations. See *Harris* v. *United States,* 359 U.S. 19, 23-24 (1959).

Affirmed.

Appendix B

Opinion of the United States District Court for the Southern District of New York, July 7, 1970

UNITED STATES *v.* MICHAEL VINCENT CATALANO and MARTIN GOLDMAN, 69 Cr. 893

The indictment in this case contained four counts. I dismissed Count 3 at the close of the government's case. The jury acquitted defendants on Counts 1 and 2, each of which charged violation of 18 U.S.C. Sec. 1952 and 2, and convicted them on Count 4, which charged a conspiracy to violate 18 U.S.C. Sec. 1952.

On the present motion to set aside the verdict, defendants argue that the acquittal on Counts 1 and 2, the substantive counts, demonstrates that the evidence was not sufficient to sustain the verdict on Count 4, the conspiracy count. In essence, they maintain that the conviction was inconsistent with the acquittal and hence cannot stand. Inconsistency of verdicts, however, is not a ground in itself for setting aside a conviction. The issue is whether the evidence was sufficient to support the verdict on the count on which the jury did find defendants guilty. I am satisfied that it was. Accordingly, this motion is denied.

Defendants also move to set aside the verdict on the ground that the indictment was based on hearsay testimony. It developed during the trial to the surprise of defendants and of the court, that the government had not called its principal witness, Williams, before the grand jury in this district which indicted defendants on December 16, 1969. Instead, the government called the grand jury reporter from the Eastern District, who identified his tran-

script of testimony which Williams had given before the Eastern District grand jury, which was then marked as an exhibit.

At my request, the government has filed affidavits setting forth the circumstances under which this was done. It appears from these that the presentation of this case to the Southern District grand jury was handled by a Special Attorney of the Organized Crime and Racketeeering Section of the Department of Justice, referred to as the "Strike Force." He states that he read the testimony of Williams given before the Eastern District grand jury verbatim to the Southern District grand jury. He further states that at the time he had been advised that Williams was "unavailable" to appear before the Southern District grand jury on the day in question, December 2, 1969. The affidavit of a Special Agent of the Federal Bureau of Investigation states that he had "attempted to reach" Williams at his residence "on several occasions prior to 2 December 1969 but was unable to reach him."

The Special Attorney's affidavit states that "no indictment was sought" from the Eastern District grand jury, for what reason does not appear. The evidence before the Southern District grand jury, apart from the transcript of Williams' testimony, would have been insufficient to justify an indictment.

In *Costello* v. *United States,* 350 U. S. 359 (1956), the Supreme Court upheld an indictment which was based solely on hearsay testimony. Since that decision, however, the practice of submitting hearsay evidence to the grand jury when competent evidence was available has several times been criticized by the Court of Appeals in this circuit.

Appendix B.

United States v. *Umans,* 368 F. 2d 725, 730 (2d Cir. 1966), *cert. dismissed,* 389 U. S. 80 (1967)
United States v. *Catino,* 403 F. 2d 491, 496 (2d Cir. 1968), *cert. denied sub nom. Pagano* v. *United States,* 394 U. S. 1003 (1969)
United States v. *Arcuri,* 405 F. 2d 691, 692 (2d Cir. 1968), *cert. denied,* 395 U. S. 913 (1969)

I have found no case in which the Court of Appeals has actually dismissed an indictment or set aside a conviction on this ground. The reason for the court's critical dicta, particularly in *Arcuri,* appears to have been that the grand jury was misled into believing that testimony given before it was based on the first-hand knowledge of the witness, when in fact it was not. That is not the case here. Williams' testimony was given under oath, although before a different grand jury, and the Southern District grand jury was informed as to what had occurred.

Moreover, in the present instance, it appears that at least on the day when the evidence was presented to the Southern District grand jury, Williams was not available to testify in person. It would doubtless have been preferable for the prosecutor to have postponed the presentation of the case to the grand jury until a day when he could have secured Williams' presence. I do not feel, however, that his failure to make this precaution requires me to set aside this verdict in the circumstances of this case and in view of the general rule as laid down in *Costello.*

The motion is denied.

So ordered.

s/ Edward C. McLean
U.S.D.J.

Dated: July 7, 1970